International Brotherhood of Painters and Allied Trades, Local Union No. 567 *and* Painting & Decorating Contractors of California and Nevada, Inc., Reno Chapter. Case 32-CB-205

September 20, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND ZIMMERMAN

On February 13, 1979, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel submitted an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent violated Section 8(b)(3) of the Act by refusing to bargain over the contractual modifications proposed at negotiations by Painting & Decorating Contractors of California and Nevada, Inc., Reno Chapter (herein called PDCA). The Administrative Law Judge concluded that Respondent violated the Act as alleged. We disagree.

The record shows that for the past 20 years the parties have had a series of collective-bargaining agreements, the last one extending from June 1, 1977, to June 1, 1978. The parties' most recent contracts contained the following reopener clause:

> Parties desiring to change or terminate this agreement may so do by notifying the other party or parties and the Joint Committee in writing, but not less than ninety (90) days prior to June 1, 1978, or ninety (90) days prior to June 1, of the subsequent calendar year. Upon notice for change only from either party or parties to the Agreement, the Chairman of the Joint Committee shall immediately set a date for a special called meeting of the Joint Committee at which time any party or parties signatory to the Agreement shall present in writing the desired changes in the working Agreement. These changes to be handed to the Chairman of the respective Negotiating Committee.

In accordance with this provision, Respondent, by letter of February 21, 1978, timely notified PDCA it wished to open seven specific sections of the agreement for negotiations. PDCA did not respond.

Pursuant to the reopener clause, a negotiating meeting of the Joint Committee was scheduled for March 14, 1978. At this meeting PDCA presented a list of contractual provisions that it wanted to change. Respondent refused to consider PDCA's contract proposals, contending PDCA did not give timely notice of its desire to make the changes. In Respondent's view, the reopener clause requires that any party wishing to make *changes only* must notify the other party of this desire at least 90 days before the contract expiration date or waive its right to propose and negotiate its own changes. PDCA took the position that once negotiations were initiated by one of the parties the whole agreement was opened for negotiations and the other party did not have to give notice.

Although both parties adhered to their opposing interpretations of the reopener clause, they continued to meet for negotiations. After seven more negotiating sessions, during which Respondent actually bargained over most of PDCA's initial proposals, the parties signed a so-called interim agreement, which appears to be interim in title only. The agreement unconditionally adopts and extends the previous contract 2 more years—from June 1, 1978, to June 1, 1980—and specifically includes certain modifications which were reached by the parties' bargaining over PDCA's proposals. PDCA's president admitted that he never indicated he wished to see the agreement abrogated, and did not know of any other member of the multiemployer group who did not support it.

The Administrative Law Judge found that the case should not be deferred to the parties' dispute-resolving mechanism and that Respondent violated Section 8(b)(3) of the Act by refusing to bargain over PDCA's original proposals. He ordered the interim agreement nullified except for the wage provision and for Respondent to continue to abide by the 1977-78 agreement until it complied anew with the 8(d) notice provisions.

We find that the parties' conduct, viewed in its entirety, warrants dismissal of the complaint. The record clearly shows that, despite the parties' differing interpretations of the contractual reopener clause concerning the right to make proprosals and to negotiate thereon, the parties effectively buried their differences by negotiating and executing a bargaining agreement. Therefore, whatever violations of the Act may have occurred at one point have now been cured by that bargaining and the reaching of a contract with which PDCA concedes it is satisfied. In these circumstances, no useful pur-

pose would be served by our examination of a small segment of the situation in order to determine whether a violation might then have occurred apart from the parties' subsequent conduct. Accordingly, we shall dismiss the complaint.[1]

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 3 of the Administrative Law Judge's Conclusions of Law:

"3. Respondent did not engage in unfair labor practices in violation of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] In light of our finding herein, we do not pass upon the Administrative Law Judge's discussion concerning the appropriateness of deferral to arbitration and the nullification of the interim agreement.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me on November 30, 1978,[1] in Reno, Nevada, pursuant to a complaint issued on July 27 by the Regional Director for Region 32 of the National Labor Relations Board. The complaint is based on a charge filed by Painting & Decorating Contractors of California and Nevada, Inc., Reno Chapter (herein called the PDCA), on April 11. The complaint alleges that International Brotherhood of Painters and Allied Trades, Local Union No. 567 (herein called Respondent), has engaged in and is engaging in certain violations of Section 8(b)(3) of the National Labor Relations Act.

Issues

The complaint alleges that Respondent violated Section 8(b)(3) by refusing to bargain over any issues other than those proposed by Respondent. Respondent defends its position contending the reopener clause of the expiring collective-bargaining agreement permitted its action here. A subsidiary issue is whether or not this dispute should be deferred to arbitration.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Both the General Counsel and Respondent filed post-hearing briefs which have been carefully considered.

Upon the entire record of the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent admits that the PDCA at all material times has been a multiemployer bargaining association consisting of various painting and decorating contractors based in Reno and Sparks, Nevada. It also admits that during the calendar year 1977 the employer members of the PDCA in the course and conduct of their businesses collectively provided services valued in excess of $50,000 directly to nonretail customers located outside Nevada and during the same period collectively had a gross volume of business exceeding $500,000 and purchased and received goods within Nevada which originated outside the State and which were valued in excess of $10,000. Accordingly it admits, and I find, that at all material times the PDCA has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times it has been a labor organization within the meaning of Section 2(5) of the Act.

III. FACTUAL SYNOPSIS, CONCLUSIONS, AND RECOMMENDATIONS

The facts are essentially undisputed. For at least the last 20 years the PDCA and Respondent have had a collective-bargaining relationship. The most recent contract had a 1-year duration and was in effect from June 1, 1977, until June 1, 1978. It contained the following provision relating to bargaining on a successor agreement:[2]

ARTICLE XXXI, SECTION 3

> Parties desiring to change or terminate this Agreement may so do by notifying the other party or parties and the Joint Committee in writing, but not less than ninety (90) days prior to June 1, 1978, or ninety (90) days prior to June 1, of the subsequent calendar year. Upon notice for change only from either party or parties to the Agreement, the Chairman of the Joint Committee shall immediately set a date for a special called meeting of the Joint Committee at which time any party or parties signatory to the Agreement shall present in writing the desired changes in the working Agreement. These changes to be handed to the Chairman of the respective Negotiating Committee.

In the comparatively recent past Respondent, when it desired to negotiate a new agreement, sent reopening letters, pursuant to the above-quoted language, expressing its desire to "terminate" the then extant agreement. In

[1] Hereinafter all dates are 1978 unless otherwise noted.

[2] Duane Johnson, the only witness in this proceeding, has been associated with the PDCA since 1948. For 10 years he was the PDCA's secretary-treasurer and has served on all its committees, including the joint negotiation committee and the joint grievance committee. He testified the reopener clause, quoted above, has been in past contracts for many years but could not recall when it first appeared.

the contract immediately preceding the one in question which expired in 1977, Respondent changed its language slightly, asking "to open the agreement, in its entirety. . . ." This, of course, had the same effect as its earlier practice of notifying the PDCA of its intent to terminate.

In 1978 Respondent changed its approach. By letter dated February 21, Respondent's financial secretary and business manager, E. C. Pierce, wrote the PDCA saying: "In accordance with Article XXXI, Section 3 of the Agreement, we hereby notify you that we wish to open the following sections of the Agreement for negotiations." That was followed by a list of specific contract clauses which Respondent wished to change. These included section 1, the preamble; article XII, section 1(h), holidays; article XII, section 7, wages; article XVI, section 2(g), apprenticeship funds; and article XXXI, sections 2, 3, and 4 relating to changing the contract's termination date.

The PDCA thereupon appointed its negotiating committee and a joint negotiating committee meeting consisting of both the PDCA's and Respondent's representatives took place on March 14. At that meeting the PDCA had given Respondent's representatives a letter saying it was willing to negotiate on the subjects mentioned by Respondent but asserted that bargaining should not be limited to those matters. The minutes of that meeting show Respondent's financial secretary, Pierce, stated that because the PDCA had failed to answer Respondent's February 21 letter, it had waived the right to negotiate changes in the contract other than those areas mentioned in Respondent's February 21 letter. Neither party was prepared to begin full negotiations and another meeting was scheduled for March 23.

At the March 23 meeting both sides presented written proposals, but Pierce again advised the PDCA that Respondent refused to consider or bargain with respect to any of the changes or proposals for change presented by the PDCA. The meeting adjourned with another meeting scheduled for April 11.

It is not clear from the record whether the next meeting occurred on April 11, but on that date the PDCA filed the instant charge with the Board's Regional Office.

On April 26, another meeting took place. Both sides discussed Respondent's proposals for a time. The management committee then attempted to discuss some of its proposals. The Union's response is exemplified in the following exchange:[3]

> Management: . . . We have problems in the Joint Committee not knowing exactly where to go, so we can get this written down a little clearer. Fair contractors, that's another thing, that's to keep these people that are not paying their fringe benefits. The Joint Committee in respect to flagrant violators, is thinking about the bond, a $5000 bond and we feel this may not be enough and we may have to consider a $10,000 bond to protect ourselves. Wages, working conditions, and hours. In its entirety, we have something we want to work on that. Fringe benefits, as it relates to vacation, on apprentices we want to go over that with the possibility of putting it on their check, or a percentage, or whatever. Dues check-off; there are some things that we feel that we the contractors have been doing for the Union. We want to go over spray regulations. Service stations clause needs some change. Jack Lindell [one of PDCA's contractors] wishes to discuss this subject and we want to go over this subject of violations.
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> Labor: Does *Management* wish to start with #1 and we will let you know whether it's a negotiable deal or not.
>
> Management: What do you mean if it's negotiable?
>
> Labor: Well, you received the deal where at the Joint Committee where your letter requesting the entire thing being opened up has as yet not been resolved. If you want to start with page 1, jurisdictional, territorial, just for clarification, what are you talking about?
>
> Management: What you are saying now is that you are going to go through this thing and let us know what you will or will not negotiate on.
>
> Labor: Yes.
>
> Management: Why?
>
> Labor: Because we told you before that, and that's why you filed with the N.L.R.B. was that your deal wasn't timely for changing the agreement.
>
> Management: No, we felt it was timely and you feel it isn't.
>
> Labor: Right, that's what we are arguing about now. We did tell you that anything you did propose, we would caucus on it and if it was negotiable we would.
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> * * * * *
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> Management: All right, let's go to page 15, section 8, or better yet, let's go to section 9. [The dues check-off clause.]
>
> Labor: That is not a negotiable item.
>
> Management: Under section 8. . . .
>
> Labor: You're talking about you want to do away with the dues check-off.
>
> Management: We didn't say that. Let's go to section 8, page 15, under vacation. We wish to put the vacation on the men's checks, and also the dues check-off and administration dues that we are obligated to administer as contractors, if you send a man over we are obligated to collect their initiation fee. That we don't want.
>
> Labor: That is not negotiable.
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> Management: Under spray regulations in its [sic] entirety, what we want to do is to be able to do a little more spraying on the interiors to keep up with the influx of the non-union people and scabs in the area. Is that negotiable?
>
> Labor: No.
>
> Management: Service stations. We want to delete that entirely. Because of the current restrictions

[3] The quoted material is from the transcript of a tape recording utilized by both parties as the official minutes of the meeting.

now in effect, such contractors as Jack Lindell cannot pick up the work.

* * * * *

Management: So, you have given us no to section 9, check off of administrative dues—what we talked about is not negotiable?

Labor: That's correct.

Management. Page 22, spray regulations, in its entirety, that's not negotiable?

Labor: Correct. [A discussion then occurred in which Respondent's spokesman stated that wages were negotiable; overtime proposals required a caucus; dues checkoff was not negotiable; and a modification of the joint committee and fair contractor clauses both required caucuses. Respondent's representatives then caucused and after it was over stated the following items were not negotiable: overtime, dues checkoff, joint committee matter, spray regulations, the service station clause (with a proviso not material here) and the contract violations trial procedures clause.]

On April 28, the Regional Director decided to defer the instant charge to arbitration and on that date issued a letter to that effect. On May 8 the PDCA appealed the Regional Director's decision to the General Counsel's Office of Appeals. While that office considered the PDCA's appeal, negotiations continued. The first meeting after the deferral letter occurred on May 4. At that meeting Respondent continued to state the matters relating to dues checkoff were not negotiable, but agreed to caucus with regard to initiation fee withholdings and also agreed to caucus on the vacation pay modification, the performance bond modification, and shift work. However, it continued to insist that spray regulations were not negotiable. After a caucus Respondent's representatives stated they would take the PDCA's proposal to its members together with its wage scale proposal to see what the membership wished to do.

Additional meetings were held on May 17, 24, 25, and 31 and June 2. On June 6 an "Interim Agreement" was reached. Since that time the parties have been operating under the interim agreement. It is a three-page document generally adopting the previous agreement, but containing some changes consistent with management's demands despite Respondent's initial position that they were not negotiable. These include renumbering the joint committee clause, inserting new bonding procedures, changing shift work, modifying the vacation savings plan, and deleting the service station article.[4] It should be observed that during the May 24 meeting Respondent advised that, if no agreement were reached by May 31, a strike would occur. It is fair to say, therefore, that the interim agreement is the result of a strike threat following Respondent's refusal to consider various management proposals. By letter dated July 13, the General Counsel's Office of Appeals reversed the Regional Director's decision to defer the dispute to arbitration.

The General Counsel contends Respondent's intransigence in refusing to consider the PDCA's proposals regarding mandatory subjects of bargaining is a straightforward refusal to bargain. The General Counsel seeks to require Respondent to cease and desist such activity and to set aside the interim agreement as being the product of Respondent's unlawful conduct. Respondent avers that the matter should be deferred to arbitration between the parties and in any event the contract permitted its conduct and no violation of Section 8(b)(3) may be found.

I find Respondent's contention that the matter be deferred to arbitration to be without merit. It is true that article IV of the contract, "Purpose of the Joint Committee," provides for a "binding" decision by a neutral person to resolve contract disputes "between the parties signatory hereto." Nonetheless this dispute is not the type which the Board normally defers to the dispute-resolving mechanism of the contract under the *Collyer* doctrine.[5] Those disputes invariably deal with such matters as wages, hours, and terms and conditions of work; i.e., mandatory bargaining subjects. Indeed, the Board has no authority to direct parties to bargain over nonmandatory subjects. For that reason the Board never defers nonmandatory subjects to arbitration. This dispute revolves not around employee contract rights, but around the negotiation of a new agreement. In a sense Respondent, by asking that this matter be deferred to arbitration, is asking the Board to send to an arbitrator a dispute the resolution of which will result in a new contract. That is tantamount to ordering "interest arbitration." Interest arbitration is not a mandatory bargaining subject[6] and therefore an inappropriate matter for deferral. Even if it may be argued that this dispute does not seek interest arbitration results, the clause in question is one which merely provides for a procedure to trigger negotiatons; it is not a substantive term which can be characterized as a mandatory bargaining subject. That being the case, it follows that deferral is still inappropriate. Respondent's deferral request is therefore denied.

With regard to Respondent's defense that the clause in question expressly permitted its conduct here, I am likewise unpersuaded. It is true that the first sentence of article XXXI, section 3, appears to give a party to the agreement the option of notifying the other party of its intent to change or terminate the agreement. However, the second sentence modifies the first by clearly stating that upon "notice for change only from either party . . . [a meeting shall be set] at which time *any* party or parties signatory to the agreement shall present in writing the desired changes in the working agreement." (Emphasis supplied.) That language is clearly contrary to the

[4] The PDCA contends that these matters should be renegotiated in the event Respondent violated Sec. 8(b)(3) of the Act. In addition, the PDCA points to other matters about which it wished to bargain but which have not been dealt with in the interim agreement. See Resp. Exh. J (last three pages) for a list of those items. Nearly all are mandatory bargaining subjects.

[5] *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971).

[6] *The Columbus Printing Pressmen & Assistants' Union No. 252, Subordinate to IP & GCU (The R. W. Page Corporation)*, 219 NLRB 268 (1975), enfd. 543 F.2d 1161 (5th Cir. 1976); *Massachusetts Nurses Association (Lawrence General Hospital)*, 225 NLRB 678 (1976), enfd. 557 F.2d 897 (1st Cir. 1977).

contention made by Respondent and permits the other party to make a counterproposal covering any topic whatsoever. That is precisely what occurred on March 23. In no way, therefore, can it reasonably be concluded that the PDCA waived its right to submit counterproposals. The PDCA simply followed the established procedure as set forth in the second sentence of article XXXI, section 3.

Finally, despite any misunderstanding which may have arisen over the interpretation of the reopener clause, the Board's rule, both in unfair labor practice cases (*South Texas Chapter, Associated General Contractors*, 190 NLRB 383 at 386 (1971)) and in contract bar cases (*Deluxe Metal Furniture Company*, 121 NLRB 995 at 1002 (1958)), is that a notice to modify the agreement is the same as a notice to terminate it. The contract was, therefore, open for all purposes under Board law for it had legally been scheduled to terminate on its expiration date. Accordingly, under all the circumstances, I am unimpressed with the defenses raised by Respondent. It is clear that the PDCA sought to bargain over various mandatory subjects and that Respondent rejected each and every one of those proposals as being "nonnegotiable" because it was not in accord with its view of the rules relating to reopening. Such conduct on the part of Respondent constituted a clear refusal to bargain in good faith within the meaning of Section 8(b)(3) of the Act.

There remains for consideration the question of remedy. The General Counsel, as noted above, seeks recision of the interim agreement even though it contains some concessions by Respondent to the PDCA with regard to the subjects the PDCA sought to bargain over. However, it is clear that those concessions were not the product of free and uncoerced collective bargaining. Indeed the interim agreement is simply an accommodation which the parties reached in order to continue orderly production pending the outcome of the instant litigation. While Respondent argues that the interim agreement should not be set aside, I see no other way to rectify the unfair advantage which Respondent obtained by its misconduct. I recognize that, because of the passage of time, the *status quo ante* can never truly be obtained. Nonetheless, anything less than an effort to restore the parties to their original stations would be insufficient.

Therefore, I agree with the General Counsel that the interim agreement should be nullified and rendered of no force or effect. See *Graphic Arts International Union, Local 280 (Samuel L. Holmes and James H. Barry Company, et al.)*, 235 NLRB 1084 (1978).[7] However, in order to permit the parties an opportunity to bargain fairly and without the threat of an immediate strike, Respondent, in addition to being ordered to bargain in good faith, shall also be ordered to maintain those working conditions previously in effect as set forth in the 1977–78 collective-bargaining contract until Respondent complies anew with the provisions of Section 8(d)(1), (2), (3), and (4) of the Act.[8] However, nothing herein shall be construed as obligating any party to rescind any increased remuneration which may now be in effect.

Upon the foregoing findings of fact, and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Painting & Decorating Contractors of California and Nevada, Inc., Reno Chapter, is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, International Brotherhood of Painters and Allied Trades, Local Union No. 567, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, between February and June 1978, by attempting to limit the subject matter of negotiations for a new collective-bargaining agreement between it and the PDCA, has violated Section 8(b)(3) of the Act.

[Recommended Order omitted from publication.]

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[7] Compare *Local 1205, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (New York Lumber Trade Association, Inc.)*, 191 NLRB 917 (1971).

[8] This remedy appears to me particularly appropriate where, as here, Respondent has expressed a concern that recision of the interim agreement may result in a strike as Respondent has a no contract, no work policy. See p. 9 of Respondent's brief.